LOWER VALLEY POWER & LIGHT, INC.

IBLA 76-738 Decided February 23, 1977

Appeal from a decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's application for a right-of-way for a power transmission line (W-55690).

Set aside and remanded.

1. Rights-of-Way: Generally--Wild and Scenic Rivers Act-- Withdrawals and Reservations: Generally--Withdrawals and Reservations: Effect of

   Public land within one-quarter mile of the banks of a river designated by Act of Congress for potential addition to the national wild and scenic rivers system is withdrawn by statute from entry, sale, or other disposition under the public land laws of the United States for a designated period to allow a study of the suitability of the river for inclusion in the system and a report to Congress thereon. This withdrawal, however, does not preclude a right-of-way grant which does not involve a conveyance of title or rights leading thereto.

2. Rights-of-Way: Generally -- Wild and Scenic Rivers Act

   The Secretary has the discretionary authority to grant a right-of-way application which includes an area designated for potential addition to the national wild and scenic rivers system where it is determined to be in the public interest. In the exercise of that discretion it is

> appropriate to consider the suitablity of the subject area for inclusion in the system, classification of the characteristics (wild, scenic, or recreational) of the river area, and whether such a land use will unreasonably interfere with the values disclosed.

APPEARANCES: Boyd A. Parker, General Manager, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

This appeal is brought from a July 14, 1976, decision of the Wyoming State Office, Bureau of Land Management (BLM), rejecting appellant's application for right-of-way for power transmission line, W-55690. The land described in the application in sections 5 and 6, T. 41 N., R. 116 W., 6th P.M., is immediately adjacent to the Snake River in Teton County, Wyoming. Appellant seeks the right-of-way for the purpose of running an electric power transmission line across the Snake River.

The decision of BLM outlined the land status: first, the portion of the Snake River at issue has been designated for potential addition to the national wild and scenic rivers system; hence, the land involved is withdrawn from disposition under the public land laws pending completion of a study of the river's suitability for inclusion in the system and the subsequent development of a comprehensive management plan. wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. § 1271 et seq. (1970), as amended, (Supp. V. 1975). Further, all of the land in the application is segregated by a proposed protective withdrawal (W-35627) published in the Federal Register on August 4, 1972. Finally, BLM noted that the bottom lands and river bed within the surveyed meander lines are currently the subject of litigation to determine who in fact holds title to the lands. BLM then stated it would be inappropriate to require completion of the application by Lower Valley, only to hold it in an inactive status until the management plan for the Snake River is prepared, until the litigation is concluded, and until a definite withdrawal order is published. Accordingly, BLM rejected the application.

All of the land embraced in appellant's right-of-way application constitutes either the river bed, bottomlands, or banks of

the Snake River. 1/ The master title plat shows that the land up to the meander lines has been patented, except for one fractional lot abutting one of the meander lines.

However, it appears that there are certain omitted lands between the meander lines which were revealed by BLM resurvey in 1971. The United States claims title to these omitted lands and has asserted its claim in a quiet title suit, United States v. Donald Albrecht, et al., No. C75-15 (D. Wyoming, filed January 22, 1975). 2/

Appellant alleges in its statement of reasons for appeal that the grant of a right-of-way is allowed by the Wild and Scenic Rivers Act. 16 U.S.C. § 1271 et seq. (1970), as amended (Supp. V, 1975). Appellant contends that the section of the river involved has a levee system which would prevent its classification as "wild" or "scenic," as opposed to "recreational." A report of the Corps of Engineers allegedly asserting that "recreational river" was the highest classification which the subject section of the Snake River could receive is cited by appellant in support of its position. Appellant further contends that granting the right-of-way for the transmission line would have no effect on the results of the study regarding suitability of the portion

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1/ The application also identifies certain land nearby required for a right-of-way across the Gros Ventre River. Appellant has not contradicted the holding of the decision below that without the right-of-way across the Snake River, the right-of-way for the same transmission line across the Gros Ventre River is a moot question.

2/ Where a body of water is found to exist and is meandered in the survey of the public domain, the result of such meander is to exclude the meandered area from the survey and to cause it, as thus separated, to become subject to the riparian rights of the respective owners of land abutting on the meander line in accordance with the laws of the several states. Lee wilson & Co. v. United States, 245 U.S. 24, 29 (1917); U.S. Department of the Interior, Bureau of Land Management, Manual of Instructions for the Survey of the Public Lands of the United States, § 7-51 (1973). However,

"[W]here upon the assumption of the existence of a body of water or lake a meander line is through fraud or error mistakenly run because there is no such body of water, riparian rights do not attach because in the nature of things the condition upon which they depend does not exist and upon the discovery of the mistake it is within the power of the Land Department of the United States to deal with the area which was excluded from the survey, to cause it to be surveyed and to lawfully dispose of it." Lee Wilson & Co. v. United States, supra at 29.

of the river involved for inclusion in the wild and scenic river system because of the existing condition of the stretch of the river involved. finally, appellant asserts that the pending title litigation should not be a bar to the grant, since it will obtain a right-of-way from any other party claiming title to the subject land.

The first issue raised is whether a righ-of-way may be granted on public land within one-quarter mile of the banks of a river designated for potential addition to the national wild and scenic rivers system before completion of the study of the suitability of the river for inclusion in the system and submission of a report thereon to Congress.

[1] The land described in appellant's right-of-way application crosses a stretch of the Snake River between Teton National Park and the Palisades Reservoir, which has been designated by Act of Congress for potential addition to the national wild and scenic rivers system. 16 U.S.C. § 1276(a) (Supp. V, 1975). All public land embraced in the application has been withdrawn by statute from disposition under the public land laws:

> (b) All public lands which constitute the bed or bank, or are within one-quarter mile of the bank, of any river which is listed in section 1276(a) of this title are hereby withdrawn from entry, sale, or other disposition under the public land laws of the United States for the periods specified in section 1278(b) of this title.

16 U.S.C. § 1279(b) (1970); T. E. Markham, 24 IBLA 5, 7 (1976).

However, a withdrawal only from "public land" status, i.e., from entry, sale or other disposition under the public land laws, does not necessarily preclude utilization of the public land by applicants for other purposes not involving acquisition of title to the land. See Noel Teuscher, 62 I.D. 210 (1955). The words "entry" and "sale," along with such words as "settlement" and "location," are terms contemplating the transfer of title to the lands in question. Udall v. Tallman, 380 U.S. 1, 19 (1965). It is reasonable for the Secretary of the Interior to construe the words "or other disposition" in the context of these other expressions to encompass only those dispositions which convey or lead to the conveyance of the title of the United States. Udall v. Tallman, supra at 19. An electric power transmission line right-of-way, by virtue of its limited duration and the limited use of the land which it authorizes, does not constitute a conveyance of title. The Secretary is thus not precluded from giving favorable consideration to an application for such a right-of-way.

Although the withdrawal does not preclude the granting of a right-of-way, the purpose of the withdrawal may provide guidance for the exercise of the Secretary's discretionary authority over right-of-way applications through areas designated for potential addition to the wild and scenic rivers system. The Secretary of the Interior (or the Secretary of Agriculture where national forest lands are involved) is charged with the responsibility of studying and submitting to the President (for submission to the Congress) reports on the suitability for addition to the national wild and scenic rivers system of rivers designated by Congress as potential additions to the system. 16 U.S.C. § 1275(a) (Supp. V, 1975). The statutory withdrawal from disposition continues for the relevant portion of the Snake River until October 2, 1979, by which time the Secretary is to complete a study of the suitability of the river for inclusion in the system and submit a report thereon. 16 U.S.C. § 1276(b) (Supp. V, 1975).

After a river has been designated as a component of the national wild and scenic rivers system, the component is to be administered in a manner that protects and enhances the values which caused the river to be included in the system without limiting other uses that do not substantially interfere with public use and enjoyment of those values. 16 U.S.C. § 1281(a) (1970). Wild and scenic rivers are to be classified and administered as one of three basic types: wild river areas, scenic river areas, and recreational river areas. 16 U.S.C. § 1273(b) (1970). The characteristics and values of the different classifications vary widely. Wild river areas, for example, are characterized by inaccessibility and primitive shorelines, whereas recreational river areas are readily accessible, may have some development along the shorelines and may have undergone impoundment or diversion in the past. 16 U.S.C. § 1273(b) (1970).

Management plans are called for to establish varying degrees of intensity for protection and development based on the characteristics of the area. 16 U.S.C. § 1281(a) (1970).

It is against this background that the authority of the Secretary of the Interior to grant rights-of-way across a component of the system must be exercised:

> The Secretary of the Interior or the Secretary of Agriculture, as the case may be, may grant easements and rights-of-way upon, over, under, across, or through any component of the national wild and scenic rivers system in accordance with the laws applicable to the national park system and the national forest system, respectively: Provided, That any conditions precedent to granting such

> easements and rights-of-way shall be related to the policy and purpose of this chapter.

16 U.S.C. § 1284(g) (1970).

[2] The BLM found itself unable to take favorable action on the right-of-way application in the absence of a suitability study with respect to the river, a classification of the characteristics of the river, and a management plan for land use. We believe, for the reasons stated above, that the discretionary authority exists to grant such a right-of-way if it is determined to be in the public interest. However, such factors as the suitability of the relevant portion of the river for inclusion in the wild and scenic rivers system, the classification of the type (wild, scenic, or recreational) of river area involved, and whether the grant of a right-of-way will unreasonably interfere with the values disclosed need to be considered in the exercise of the discretion. Any determination in the public interest must be consistent with the policies expressed in the Wild and Scenic Rivers Act of October 2, 1968, 16 U.S.C. § 1271 et seq. (1970), as amended (Supp. V, 1975).

Appellant's assertion that "recreational" area is the highest classification that could be accorded to the subject stretch of river and that a right-of-way for power transmission line would not adversely effect the suitability of the river for inclusion in the system may be found correct ultimately. This cannot now be ascertained by the Board. The matter will have to be evaluated by the BLM.

The land involved in this right-of-way application is also included in a Notice of Proposed Withdrawal and Reservation of lands (W-35627) pursuant to the authority of 43 U.S.C. § 141 (1970) 3/ and Executive Order 10355. 17 F.R. 4831 (May 26, 1952). The Notice itself was published at 37 F.R. 15743 (August 4, 1972).

The proposed withdrawal is from all forms of appropriation under the public land laws except the mineral leasing laws. The noting of the application for withdrawal on the tract books or the official plats maintained in the office in which the application was filed is effective to segregate the land from all forms of disposal under the public land laws which would be barred by the proposed withdrawal until final action is taken on the withdrawal. T. E. Markham, supra at 6. 43 CFR 2351.3;

3/ Repealed by § 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792 (October 21, 1976). See footnote 4 infra.

43 CFR 2091.2-5. 4/ But this segregation does not act against the granting of a right-of-way.

Similarly, if public interest dictates the granting of the proposed right-of-way in issue, the title dispute is not a bar. If the title eventually is determined not to be in the federal government, crossing of the fee land can be protected by Lower Valley's right of eminent domain.

We conclude, therefore, that BLM was not required by statute or precedent to reject appellant's application. The decision will be set aside and the case remanded for further study and consideration. This is not to say that the application may not be rejected, but that any such rejection must be predicated upon sound bases.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and the case remanded for further consideration.

Newton Frishberg

Chief Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge.

4/ Section 704(a) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2792 (October 21, 1976) repealed 43 U.S.C. § 141 (1970). However, the segregative effect of applications for withdrawal pending on the date of approval of the Act is preserved. § 204(g) of the Federal Land Policy and Management Act of 1976, 90 Stat. 2754 (October 21, 1976).